85-617

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No._____

In the Supreme Court of the United States

October Term, 1985

RANDOLPH VINCENT KULLBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

What Is the Appropriate Sanction in a Case Where the Police Officer, Seeking a Search Warrant, Submits an Affidavit in "Bad Faith" and Testifies Falsely in Its Defense at a Hearing on a Motion to Suppress?

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PARTIES TO THE PROCEEDING

There were two parties to the consolidated appeal in the United States Court of Appeals for the Ninth Circuit. They were the Petitioner, Randolph V. Kullberg, and John Philip Hutchins. They were co-defendants in the criminal action in the United States District Court for the Southern District of California. The other defendants in the district court criminal action were Albert L. Hall and Judith Pelayo-Pelayo.

REFERENCE TO OFFICIAL REPORTS

The opinion of the Court of Appeals was ordered not for publication. A copy is attached to this petition as Appendix A. Petitioner Kullberg's appeal, No. 83-5327, was consolidated with Dr. Hutchins' appeal, No. 83-5329, in the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1985. A petition for rehearing and the suggestion for a rehearing en banc was denied and rejected in an Order filed September 12, 1985. See Appendix D. Jurisdiction of this Court is established by virtue of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

The constitutional provisions which the instant case involves is the Fourth and Fifth Amendments to the United States Constitution.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Jurisdiction of the District Court and Court of Appeals

Jurisdiction of the District Court is predicated upon the provisions of 18 United States Code, Section 3231. Jurisdiction of the Court of Appeals is based upon the provisions of 28 United States Code, Section 1291.

Statement of Prior Proceedings

On February 25, 1983, an indictment was filed in the United States District Court for the Southern District of California charging Petitioner KULLBERG, among others, with conspiracy to possess with the intent to distribute cocaine, in violation of Title 21, U.S.C. sections 841(a)(1) and 846, with possession with intent to distribute cocaine, in violation of Title 21, U.S.C. section 841(a)(1), with conspiracy to possess with intent to distribute heroin, in violation of Title 21, U.S.C. section 841(a)(1). and 846, and with possession with intent to distribute heroin, in violation of Title 21, U..C. section 841(a)(1).

On April 1, 1983, Petitioner filed his notice of motions and motions to suppress evidence.

On May 9 and June 7, 1983, Petitioner's motions were heard. After receiving evidence and argument, and requesting written argument, the Court took the motions under submission.

On July 15, 1983, the Court made its order in writing regarding petitioner's motions. The District Court granted the motion to suppress evidence of heroin discovered in a self-storage locker which was leased to petitioner and co-defendant Hall. The Court denied the motion to suppress evidence of cocaine found in the Petitioner's home. That denial is the issue appealed to the Court of Appeal. A copy of the relevant portions of the Order is attached as appendix B.

On August 16, 1983, a judgment of discharge, dismissing counts three and four of the indictment with regard to Petitioner was entered as a result of the granting of the motion to suppress.

On October 4, 1983, the Government filed a superseding information charging Petitioner with a conspiracy to possess cocaine.

On October 4, 1983, petitioner proceeded by way of a stipulated facts court trial, and the court found appellant guilty of the charge.

On December 12, 1983, the Judgment and Commitment was entered in the District Court on December 13, 1985. The Judgment is attached in Appendix C.

On December 16, 1983, petitioner filed timely notice of appeal.

On May 8, 1985, the appeal was argued and submitted.

On June 11, 1985, a Memorandum was filed affirming the district court. (Appendix A)

On June 25, 1985, a Petition for Rehearing and Suggestion for Rehearing En Banc was filed by petitioner.

On September 16, 1985, and Order was filed denying the petition and rejecting the suggestion. (Appendix D)

Statement of the Facts

On February 17, 1983, at 4:00 p.m., Drug Enforcement Administration (D.E.A.) Special Agent Richard E. Gorman obtained search warrants for 2905 Via Del Cielo, Fallbrook, California (Co-Defendant John Hutchins' residence), and 110-8th Street, Del Mar, California (Petitioner's residence), from the United States Magistrate Edward A. Infante. The search warrants were executed late that evening.

During the search of 110 8th Street, the agents seized quantities of cocaine, and miscellaneous documents. During the execution of the search warrant at 110 8th Street, Co-Defendant Pelayo-Pelayo was found in the living room of the house. The agents also seized a lease agreement in the name of Petitioner Kullberg

and Co-Defendant Hall for self-storage unit No. 497 at the Rose Canyon Self-Storage on Morena Boulevard in San Diego.

On February 18, 1983, a search warrant for the storage facility was obtained and later executed. The search warrant which was issued for the search of the storage facility was also based on the affidavit of Agent Gorman. Considerable misrepresentations and omissions were made by Agent Gorman in his affidavit. This resulted in the suppression of the evidence seized from the storage locker as reflected in the Order of the District Court Judge, Honorable Gordon Thompson. (Appendix B)

Upon execution of the warrant for the storage facility, heroin was found in a safe within the storage unit.

Thereafter, Petitioner was arrested, indicted and convicted as reflected in the above Statement of the Case.

REASONS FOR GRANTING THE WRIT

The Supreme Court should consider the implications of United States v. Leon in determining the sanctions that should be imposed where a government agent is guilty of serious, "bad faith," misconduct in securing a search warrant, and perjury in the hearing on the motion to suppress.

It is Petitioner's position that the misconduct of the D.E.A. agent in charge of the investigation demonstrates such a contempt for the judiciary and the legal system that all evidence gathered by him should be suppressed, and that such an order by the Supreme

Court would fulfill the ultimate purposes of the exclusionary rule: deterrence of deliberate misconduct and upholding the integrity of the courts. Furthermore, the due process clause of the Fifth Amendment to the United States Constitution would support and serve as the basis for such a ruling.

In light of the bad faith shown in preparation of the affidavit in support of the search warrant in this case, and in the testimony before the District Court on the motion to suppress, this Court should consider the effect of the ruling in *United States v. Leon*, 82 L Ed2d 677 (1984). That opinion states that "(i)f exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officer...." 82 L Ed2d at 695. If the Court rules that the affiant acted in bad faith in preparation of the affidavit, and in his testimony defending that affidavit, petitioner maintains that the sanction imposed by the District Court is not of a kind that would deter that officer, or others, from similar transgressions in the future.

The District court's order on the motion to suppress accurately sums up the case establishing the misconduct of the agent. First, the Judge determined that there was a complete lack of information in the affidavit that could amount to probable cause for issuance of a search warrant. He restates the position of the Government, a position that is based on personal beliefs of the agent, misstatements of fact regarding the alleged criminal re-

cords of Petitioner and Co-Defendant Hall and irrelevant information regarding the conduct of Co-Defendant Hutchins four years prior to this incident. He sums up the logic of the agent: "The government argues that since a kilogram of cocaine was not found when the house was searched, 'it is probable that it was in the storage facility.' Probable cause to believe that a defendant is guilty of possessing contraband does not justify a search of all residences, vehicles or premises owned or used by him." See Appendix B.

There is a total absence of any facts to support a reasonable and objective finding of probable cause to search the storage locker. *Leon* defines bad faith as a situation where "the officers were dishonest or reckless in preparing their affidavit or could not have habored an objectively reasonable belief in the existence of probable cause." 82 LEd2d at 701.

The District Court's Order also demonstrates that there was recklessness and dishonesty. He finds that facts are omitted from the affidavit that would have negated probable cause. The agent knew at the time he prepared the affidavit that it was unlikely, if not impossible, for the storage locker to be used in connection with the drug trafficking that was the subject of his investigation. He knew that the locker was closed to the public during the hours that it would have had to be used to facilitate the transaction that was discussed in the affidavit. And the Judge finds that the agent knew that the Petitioner had not visited the locker for a con-

siderable time prior to the writing of the affidavit. The agent directly denied having this knowledge during the hearing on the motion. The Judge apparently did not believe he was telling the truth.

There were other omissions from the affidavit revealed in the testimony of the agent. While he attempted to convince the Magistrate that the locker was part of the Petitioner's modus operandi regarding narcotics transactions, he knew this not to be the case. He had information that the Petitioner used the residence for storage of contraband. He had no information regarding such a use of the storage locker. And yet he omitted all information negating his unsupported contention that the storage locker was used in such a manner. All of this is apparent from a reading of the transcripts in this case.

It is Petitioner's position that the court has the authority to order, and should order, the suppression of all evidence gathered by virtue of the warrants obtained by the agent. We acknowledge that the above-mentioned omissions and misconduct occurred after the search of residence, and it is the evidence seized from the residence that Petitioner seeks to suppress. The Court has the authority, however, to suppress the fruits of an otherwise technically proper search if the conduct of the police is so offensive to the values embodied in the Constitution that Due Process requires a sanction to be applied. *Rochin v. California,* 342 U.S. 165 (1952).

This entire case, including a careful reading of the transcripts of the hearings, provides a flagrant example of misconduct not only towards the Petitioner, but towards the entire legal system. Above all, the main purpose of criminal actions is to determine the truth. The agent's deceptions strike directly at that central function. Since agents are generally assumed by courts to be telling the whole truth in their affidavits and in their testimony, such behavior strikes at the very integrity of the entire truth-seeking process. There is no more helpless defendant than the defendant that is faced with a less than honest prosecution. On points of law there is always available a fair appeal. But on matters of truth the initial opinion of the trial judge is almost always the final word.

In this case the trial judge has chosen to disbelieve the policeman. This situation presents the ideal opportunity for application of a sanction that would deter this officer, and others, from taking advantage of their position and the credibility which they normally enjoy. If we are to protect the results of good faith, but unconstitutional, searches by police officers, it is only reasonable and appropriate to create a deterrence to officers who engage in misconduct and deception, even though the evidence they gather may be otherwise admissible.

CONCLUSION

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit

entered on June 11, 1985. This writ should be granted in order to expand on the meaning and implications of *United States v. Leon.*

Dated: October 4, 1985.

Respectfully submitted,

PATRICK J. BRIGGS,
Counsel for Petitioner

KRECH & COLE
WILLIAM P. COLE

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

Filed June 11, 1985
By PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RANDOLPH V. KULLBERG, *Defendant-Appellant.*	No. 83-5327 DC No. CR 83-179-GT
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOHN PHILLIP HUTCHINS, *Defendant-Appellant.*	No. 83-5329 DC No. CR 83-179-GT Memorandum*

Appeal from the United States District Court for the Southern District of California

GORDON THOMPSON, DISTRICT JUDGE, Presiding

Argued and Submitted May 8, 1985 — Los Angeles, California.

Before: KENNEDY, HUG and FERGUSON, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

This is a consolidated appeal by two defendants who were convicted of violation of 21 U.S.C. §§ 841(a)(1) and 846. Defendant Randolph Kullberg contends the DEA agent who obtained and executed the warrant to search his residence did so in "bad faith" and all the evidence seized should have been suppressed. Alternatively, he argues there was no probable cause as the confidential informant was of unknown reliability. Defendant Dr. John Hutchins makes the same argument regarding probable cause as Kullberg, and also contends that the information was stale and that items were taken which were beyond the scope of the warrant.[1] We disagree with the appellants, and affirm the district court.

The warrant to search the Kullberg residence was supported by a detailed 10-page affidavit which told of an on-going drug operation. The information came from a confidential informant and was corroborated by a concerned citizen and the independent work of a San Diego police officer assigned to the DEA Narcotic Task Force. Under the test of *Illinois v. Gates*, 103 S. Ct. 2317 (1983), the totality of the circumstances presented to the magistrate gave him a "substantial basis for . . . conclud[ing]" that there was probable cause. *Id.* at 2332. On that basis, the warrant is valid.

We decline Kullberg's invitation to interpret Judge Thompson's findings concerning omissions from the af-

[1] Hutchins contends seven guns and miscellaneous photographs were illegally seized. The district court found photographs to have been specifically listed in the warrant, and the guns to have been taken because they fell into the plain view exception of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

fidavit in support of the warrant to search the storage unit as showing the agent's "bad faith." The district court spoke only of a lack of probable cause in invalidating that warrant. We do not agree that the ambiguous wording of the affiant's relationship with the informant makes the warrant invalid. While the affiant's choice of works could have been more precise, Kullberg does not dispute that the agent had dealt with this informant before and had received credible information from him. Therefore, the agent's words simply were not false and there is no reason to remove them from the affidavit, *see Franks v. Delaware*, 438 U.S. 154 (1978), nor does the ambiguity in wording affect the reliability of the informant who had previously supplied information to this affiant. Therefore, Kullberg's appeal must fail.

We need not address the validity of the warrant for Hutchins' residence. Both parties agree that no evidence seized in that house was introduced at the trial. Hutchins was convicted on stipulated facts. Therefore, if there was any error, it was clearly harmless. Fed. R. Crim. P. 52(a). Insofar as Hutchins' appeal is read as seeking a return of the property which the government still holds, the proper procedure is a motion to return property, which should be made to the district court which has jurisdiction. *United States v. Palmer*, 565 F.2d 1063, 1064 & n.1 (9th Cir. 1977).

The district court is AFFIRMED.

APPENDIX B

Filed July 15, 1983
Entered July 19, 1983
Clerk, U.S. District Court
Southern District of California
By: ELISSA BOG, *Deputy*

United States District Court
Southern District of California

UNITED STATES OF AMERICA,
Plaintiff,

v.

DR. JOHN PHILIP HUTCHINS,
RANDOLPH VINCENT KULLBERG,
JUDITH PELAYO-PELAYO, and
ALBERT L. HALL,
Defendants.

Criminal Case No. 83-179-GT

ORDER

On February 17, 1983, at 4:00 p.m., DEA Agent Gorman obtained search warrants for 2905 Via Del Cielo in Fallbrook and 110 8th Street in Del Mar from Magistrate Infante. The search warrants were executed late that evening. During the search of 2905 Via Del Cielo, the agents seized quantities of marijuana, cocaine and other miscellaneous drugs, drug paraphernalia, guns and miscellaneous documents. During the execution of the search warrant at 110 8th Street, Pelayo was found in the living room of the house. Agent Gorman placed her under arrest and searched her purse. The search of the purse revealed a quantity of cocaine. In the house itself, the agent seized,

inter alia, quantities of marijuana, cocaine and the miscellaneous drugs, a loaded 12-gauge shotgun, drug paraphernalia, records of numerous narcotic transactions and other miscellaneous documents. The agents also seized a lease agreement in the name of Kullberg and Hall for self-storage unit #497 at the Rose Canyon Self Storage on Morena Boulevard in San Diego. Heroin was found in a safe in the self-storage unit.

Defendants were charged in a four-count indictment. Count One charges Hutchins, Kullberg and Pelayo with conspiracy to possess the intent to distribute cocaine. Count Two charges Hutchins, Kullberg and Pelayo with possession with intent to distribute cocaine. Count Three charges Kullberg and Hall with conspiracy to possess with intent to distribute heroin. Count Four charges Kullberg and Hall with possession with intent to distribute heroin.

Defendants have filed the following motions:

Hall

1) to supress all evidence seized from the self storge unit and to traverse the search warrant;

2) to sever Counts One and Two from Counts Three and Four;

3) to sever Hall from Kullberg in Counts Three and Four;

4) to suppress statements based on *Miranda* violations;

5) to join in the motions of his co-defendants.

Kullberg

1) to suppress all evidence seized from 110 8th Street;

2) to suppress all evidence seized from the self-storage unit;

3) to sever his trial from that of his co-defendants;

4) to join in the motions of his co-defendants.

Pelayo

1) to suppress evidence seized from 110 8th Street;

2) to suppress evidence seized from her purse and suitcase;

3) to sever her from her co-defendants;

4) to reveal the informants' identity and allow pretrial interview;

5) to join in the motions of her co-defendants.

Hutchins

1) to suppress all items seized from 2905 Via Del Cielo;

2) for pretrial discovery and inspection;

3) to sever him from his co-defendants;

4) to join in the motions of his co-defendants.

To avoid confusion, each motion of each defendant will be discussed separately.

Hall

1) *Search of self-storage unit.*

Hall first argues that there was no probable cause that specific contraband was to be found in the storage unit. In justifying the search of the storage unit the government depends upon the following factors. First, Agent Gorman stated that it was his "experience that narcotics violators

will frequently utilize self storage facilities to conceal records, paraphernalia, additional narcotics and evidence of other illegal activities," and that both Hall and Kullberg were alleged to be "documented narcotics violators" of record with the DEA. Agent Gorman's belief does not satisfy the requirement that there be probable cause that contraband is likely to be found in a particular place. In addition, Hall has no convictions at all, and Kullberg had only been convicted of possession of marijuana. Second, Hutchins was alleged to have "utilized multiple storage facilities to conceal additional controlled substances, records and narcotics paraphernalia." However, this prior incident was in 1979, and was totally unrelated to either Kullberg or Hall. The fact that Hutchins used a storage unit in 1979 does not show that persons who allegedly sell cocaine to him in 1983 will also use a storage unit. Third, Hutchins told Agent Gorman that although Kullberg had some quantities of cocaine in his residence, it would take two days to get large quantities. This, however, points to lack of immediate access. Finally, on February 17, 1983, Hutchins agreed to sell one kilogram of cocaine to Agent Gorman. The search warrant was executed at the Del Mar residence before the sale took place. The government argues that since a kilogram of cocaine was not found when the house was searched, "it is probable that it was in the storage facility." Probable cause to believe that a defendant is guilty of possessing contraband does not justify a search of all residences, vehicles or premises owned or used by him. *United States v. Lucarz,* 430 F.2d 1051 (9th Cir. 1970); *United States v. Gramlich,* 551 F.2d 1359 (5th Cir. 1977).

Even assuming that the above factors do estalish probable cause to believe that contraband would be found in the self-storage unit, Hall's second argument is well taken. He argues that certain facts were omitted from the affidavit which, if included, would have negated probable cause. First, Agent Gorman knew that the storage unit closed at 6:00 p.m., and that no one could gain access after that time. The deal was to have taken place well after 6:00 p.m. Second, Hutchins told Agent Gorman that it would take only a few minutes to return with more cocaine. However, a trip to the self-storage unit would have taken at least one-half hour travelling time. Finally, Debby Gallagher, who documented all activity at the self-storage unit, testified that she informed Agent Gorman that Kullberg had not visited the unit since January 30, 1983.

The fact that contraband is not found where it is expected to be found does not authorize a search of any other location owned or used by the suspect which could conceivably serve as a hiding place. There must be a showing that the contraband is to be found in a particular place. There was no such showing here, especially in light of the facts which were omitted from the affidavit. Those facts diminish whatever probability there was that the contraband would be found in the storage unit. Therefore, the motion to suppress all evidence seized from the self-storage unit is granted. . . .

Kullberg

1) *Search of 110 8th Street.*

Kullberg's argument is three-pronged. First, he argues that the search warrant did not authorize seizure of the

lease agreement. He then argues that the term "records" is too broad and gives the officers executing the search warrant too much discretion. Finally, he argues that there was insufficient probable cause to list the items in question in the warrant. Kullberg is concerned with supressing the lease agreement for the self-storage unit. Although the court denies this motion, it need not even reach it since it has already been determined that the search of the storage unit was not supported by probable cause.

2) *Search of the storage unit.*

This motion is granted for the reasons stated above.

. . .

APPENDIX C

Filed December 13, 1983
Entered July 19, 1983
Clerk, U.S. District Court
Southern District of California
By: V. E. MOHLER, *Deputy*

United States District Court
For The
Southern District of California

UNITED STATES OF AMERICA

v.

RANDOLPH V. KULLBERG (2)

No. 83-0179-GT
CRIMINAL

On this 12th day of December, 1983 came the attorney for the government and the defendant appeared in person and by counsel, Patrick Briggs.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty has been convicted of the offense of conspiracy to possess a controlled substance with intent to distribute in violation of 21 USC 841(a)(1) and 846 as charged in the superseding information in 1 count and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years and pursuant to 18 USC 4205(b)(2) the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the United States Parole Commission.

IT IS ORDERED that the underlying indictment is hereby dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GORDON THOMPSON, JR.
United States District Judge

Filed: December 12, 1983
WILLIAM W. LUDDY, *Clerk*

By: V.C. MOHLER, *Deputy*

APPENDIX D

Filed September 12, 1985
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

RANDOLPH V. KULLBERG,
Defendant-Appellant.

No. 83-5327
DC No. CR 83-179-GT
Southern California
ORDER

Before: KENNEDY, HUG and FERGUSON, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.